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Prison Law - Casey v. Lewis: The Legal Burden Is Raised; The Physical Barrier Is Spared

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PRISON LAW

CASEY v. LEWIS: THE LEGAL BURDEN IS RAISED; THE PHYSICAL BARRIER IS SPARED

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I. INTRODUCTION

In *Casey v. Lewis*,[1] the Ninth Circuit held that a prisoner's Fourteenth Amendment rights of meaningful access to the courts are not violated when he[2] is prohibited from contact visitation with his attorney under an Arizona prison regulation.[3]

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The views expressed herein are those of the author and do not represent court policy or the views of any of the judges.

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1. Casey v. Lewis, 4 F.3d 1516 (9th Cir. 1993) (opinion by Farris, J., joined by Goodwin, J.; partial concurrence and partial dissent by Pregerson, J.).

2. The male and female pronouns will be used alternately throughout this Note in reference to the prisoner.

3. The Arizona non-contact visitation policy provides that, "[t]he following inmate population shall have non-contact visits: Special Management Unit, Alhambra Reception Center, and inmates in lock down status or as designated by the Warden." *See Casey*, 4 F.3d at 1526 n.1 (Pregerson, J., dissenting).

A non-contact visit is a "visit between an inmate and his visitor that is conducted without any physical contact and with a physical barrier between them."

The Ninth Circuit requires prisoners to demonstrate the unreasonableness of a prison regulation which infringes upon their constitutional rights.[4] Further, the court approves an adequate law library as an alternative to attorney-client visits to satisfy a prisoner's Fourteenth Amendment rights of meaningful access to the courts,[5] discounting counsel's indispensable services to a prisoner.[6]

II. FACTS AND PROCEDURAL HISTORY

Prisoners housed at certain Arizona Department of Corrections (hereinafter "ADOC") facilities are barred from contact visits with their attorneys under an ADOC policy.[7] The prisoners housed in these facilities range from newcomers[8] to death row inmates[9] and are classified at different security levels.[10]

Id. at 1526 (citing Ariz. Admin. Code § R5-1-101(10)).

In *Casey*, prisoners at an Arizona prison facility also challenged, under the Rehabilitation Act, the prison policy prohibiting prisoners infected with human immunodeficiency virus from food service employment. The Ninth Circuit concluded that the inmates lacked standing to challenge the food service policy. *Id.* at 1524. Judge Pregerson concurred in the majority's disposition of this issue. *Id.* at 1525. This Note will not address the food service policy.

4. *Casey*, 4 F.3d at 1520.

5. *Id.* at 1521-22.

6. *See infra* note 157 for a discussion on the distinction between a prisoner's Sixth Amendment right to counsel in criminal prosecution and an attorney's assistance in the context of the Fourteenth Amendment.

7. Casey v. Lewis, 4 F.3d 1516, 1518-19 (9th Cir. 1993). The non-contact visitation policy is implemented in the Special Management Unit [hereinafter "SMU"], Cellblock 6 [hereinafter "CB6"], the Alhambra Reception Center, and any lock-down unit. *Id.*; *see supra* note 3 for the relevant part of the challenged policy.

8. *Casey*, 4 F.3d at 1533. The Alhambra Reception Center houses all incoming prisoners, including short-timers convicted of non-violent crimes and more dangerous prisoners. *Id.*

9. *Id.* CB6 houses approximately 100 inmates, half of whom are sentenced to death. *Id.* at 1519.

10. *Id.* at 1519. When being committed to a prison, each inmate is rated according to his public risk, institutional risk, medical and health care needs, mental health needs, educational needs, vocational training needs, work skill needs, alcohol/drug treatment needs, sex offense treatment needs, and proximity to resident needs. *See* ARIZ. DEP'T OF CORRECTIONS, INTERNAL MANAGEMENT POLICY, § 500.1. Each factor is scored from one to five with the most important needs scored at five and least important needs at one. *Id.* Arizona Department of Corrections [hereinafter "ADOC"] reviews an inmate's classification every six months. *Id.*

When visiting with their attorneys at these designated facilities, prisoners are separated from their attorneys by cinder-block or glass[11] or are confined in a caged area.[12] Attorneys have to confer with their inmate clients through a telephone, or by shouting through a small hole in the partition.[13] Documents, not more than two pages at a time, are exchanged "through a narrow wavy slit."[14] The attorney cannot simultaneously review a document with her inmate client.[15]

In January 1990, twenty-two prisoners, frustrated by the non-contact visitation policy, initiated a class action[16] against ADOC's agents, officials, and employees for violating their due process rights of access to the courts under section 1983 of Title 42 of the United States Code.[17] Attorneys from the American Civil Liberties Union (hereinafter "ACLU") National Prison Project represented the Arizona prisoners.[18] The district court granted summary judgment

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11. *Casey*, 4 F.3d at 1519. At SMU, a cinder-block or glass partition separates the prisoners from their attorneys. *Id.*

12. *Id.* At CB6, the visiting area for prisoners is approximately seven feet high, four feet wide, and three feet deep. *Id.*

13. *Id.*

14. *Casey*, 4 F.3d at 1526-27. If more than two pages need to be exchanged, a guard's assistance is required. *Id.*

15. *Id.*

16. The certified class consisted of all adult persons in the custody of the Arizona Department of Correction at present or in the future. *Casey*, 4 F.3d at 1518.

17. Id. The federal statute provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

To prevail in a section 1983 action, prisoners must show that: (1) prison officials were acting under color of state law; and (2) the officials' actions or regulations subjected them to a deprivation of a constitutional right. West v. Atkins, 487 U.S. 42, 48 (1988).

18. *Casey*, 4 F.3d at 1518. The National Prison Project was formed by the American Civil Liberties Union in 1972 in the aftermath of the Attica prison riots tragedy. The Project primarily litigates cases involving adult and juvenile offenders' Eighth Amendment rights against cruel and unusual punishment and

in favor of the prisoners and enjoined ADOC from obstructing contact visits between inmates and their attorneys.[19]

The Ninth Circuit reversed the summary judgment on the contact visitation issue and vacated the injunction.[20]

III. BACKGROUND

A. PRISONERS' RIGHT OF ACCESS TO THE COURTS

The Fourteenth Amendment of the United States Constitution extends due process protection to all persons.[21] Prisoners are included, because "[p]rison walls do not form a barrier separating prison inmates from the protection of the Constitution."[22]

Historically, however, prisoners have been denied the rights of ordinary citizens.[23] The recognition that prisoners retain a residuum of constitutional rights after incarceration emerged gradually,[24] but not without occasional retreat.[25]

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usually has 20 to 25 cases in progress at any given time. The Project has eight full-time staff attorneys and is headquartered at 1875 Connecticut Avenue NW, Suite 410, Washington, DC 20009. The telephone number is 202-234-4830.

19. Casey v. Lewis, 773 F. Supp. 1365 (D. Ariz. 1991). The district court granted the summary judgment in favor of the prisoners on August 31, 1991 and amended its memorandum order on September 6, 1991. *Casey*, 4 F.3d at 1518.

20. *Casey*, 4 F.3d at 1524-25.

21. U.S. CONST. amend. XIV; Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953) (the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment extend their inalienable privileges to all persons).

22. Turner v. Safley, 482 U.S. 78, 84 (1987). *See also* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129 (1977); Meachum v. Fano, 427 U.S. 215, 225 (1976); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *id.* at 556 ("Prisoners may also claim the protections of the Due Process Clause."); Pell v. Procunier, 417 U.S. 817, 822 (1974) (recognizing that prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments); Lee v. Washington, 390 U.S. 333 (1968) (acknowledging that prisoners are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment).

23. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) ("[The prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.").

24. *See* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER, 81-93 (1988) (discussing the emergence of prisoner civil rights and their development). Acknowledgement of a prisoner's religious freedom presents an ex-

1. *Right of Meaningful Access to the Courts*

Due process of law incorporates "as a corollary the requirement that prisoners be afforded access to the courts."[26] As early as 1941, the Supreme Court recognized that such access rights may not be abridged.[27] In *Ex parte Hull*,[28] the Court struck down a prison regulation which prohibited prisoners from filing an "improperly" drafted habeas petition as impairment of a prisoner's access to the courts.[29] The prison's policy authorized parole board officials to review all legal documents prepared by inmates prior to filing with the courts.[30] The Court stressed that courts had sole power to determine the propriety of a pleading, prohibiting prison officials from being barriers between prisoners and the courts.[31]

In the 1960s and early 1970s, Supreme Court decisions characterized prisoners' access rights as fundamental rights. Consequently, an indigent prisoner's docket fees were waived when filing appeals and habeas corpus petitions.[32] Trial records were furnished to prisoners who were unable

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ample. In the 1960s, Muslim inmates' request for special dinner house during the Ramadan fast period did not raise any constitutional issue. Childs v. Pegelow, 321 F.2d 487, 490 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964). Almost ten years later, the Supreme Court stated that prisoners shall be afforded opportunities to exercise their religious freedom. Cruz v. Beto, 405 U.S. 319, 322 & n.2 (1972).

25. Cases from both the Supreme Court and appellate courts in the 1980s appear to have curtailed prisoners' rights. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348-50 (1981) (holding that no Eighth Amendment violation resulted from double-celling inmates in sixty-three-square-foot cells, despite that the double-celling raised the inmate population above the facility's capacity); Evans v. Johnson, 808 F.2d 1427 (11th Cir. 1987) (per curiam) (holding that convicted prisoners had no absolute constitutional right to family visitation); Jihadd v. O'Brien, 645 F.2d 556, 562 (6th Cir. 1981) (refusing to establish prisoners' constitutional rights to wear beards on religious grounds). See generally Lance D. Cassak, *Hearing the Cries of Prisoners, The Third Circuit's Treatment of Prisoners' Rights Litigation*, 19 SETON HALL L. REV. 526 (1989) for a discussion of the Supreme Court's retreat from an expansion of the rights of inmates.

26. Procunier v. Martinez, 416 U.S. 396, 419 (1974).

27. *See* Ex Parte Hull, 312 U.S. 546 (1941).

28. *Id.*

29. *Id.* at 549.

30. *Id.*

31. *Id.*

32. Burns v. Ohio, 360 U.S. 252, 257 (1959); Smith v. Bennett, 365 U.S. 708 (1961).

to buy them, to safeguard an adequate and effective appeal.[33] Attorneys were appointed to indigent prisoners to appeal their convictions.[34] Where the state could not provide legal counsel, prisoners were permitted to assist each other in preparing habeas petitions[35] or civil rights complaints.[36]

In 1977, the Supreme Court, in *Bounds v. Smith*,[37] explicitly stated that prisoners had a constitutional right of access to the courts.[38] In *Bounds,* prisoners alleged that the North Carolina Department of Correction was not equipped with a legal research facility, thereby violating the prisoners' Fourteenth Amendment right of access to the courts.[39] The prison administration argued that implementing the right of access would create a financial burden.[40] The Court rejected the administration's argument because "the cost of protecting a constitutional right cannot justify its total denial."[41] Moreover, the state must "shoulder affirmative obligations to assure" meaningful access.[42] The Court decided that either "adequate law libraries or adequate assistance from persons trained in the law" could satisfy the fundamental constitutional right of access to the courts.[43]

However, the Court cautioned that such a decision did not embody the "full breadth of the right of access" guaran-

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33. Griffin v. Illinois, 351 U.S. 12, 20 (1956); Lane v. Brown, 372 U.S. 477 (1963).

34. Douglas v. California, 372 U.S. 352, 358 (1963) (deciding the issue under the Fourteenth Amendment); *see also* John L. v. Adams, 969 F.2d 228, 233-37 (6th Cir. 1992) (holding that the state must provide imprisoned juveniles with access to attorneys in constitutional and section 1983 claims relating to incarceration).

35. Johnson v. Avery, 393 U.S. 483 (1969).

36. Wolff v. McDonnell, 418 U.S. 539, 579-80 (1974).

37. 430 U.S. 817, 821 (1977).

38. *Bounds*, 430 U.S. at 821.

39. *Id.* at 818.

40. *Id.* at 823.

41. *Id.* at 825.

42. *Id.* at 824.

43. *Bounds,* 430 U.S. at 828. In Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 855 (9th Cir. 1985), the Ninth Circuit held that a prison must provide inmates with access to an adequate law library or, *in the alternative*, with adequate assistance from persons trained in the law.

teed under the Fourteenth Amendment.[44] Access to legal materials,[45] assistance of fellow inmates in preparing a petition or complaint,[46] delivery of legal correspondence,[47] receipt of stationery and mailing supplies for preparing and filing legal documents,[48] and access to legal and telephone directories[49] all signify diverse aspects of the access right.[50]

2. *Attorney-Prisoner Communications As an Aspect of the Constitutional Rights of Access to the Courts*

Communications between an inmate and his legal counsel constitute an important aspect of the right of access to the courts.[51] Protected attorney-inmate communication includes telephoning the attorney,[52] corresponding with the attorney,[53] and personal meetings with the attorney on prison premises.[54]

In *Ching v. Lewis*,[55] the Ninth Circuit expressly held that attorney-client contact visitation was included under the Fourteenth Amendment's right of access to the courts.[56] The inmate in *Ching* was denied contact visits with his attorney and had to yell through a hole in the glass partition when conversing with his attorney.[57] He argued that his right of access to the courts had thus been

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44. *Bounds*, 430 U.S. at 824.

45. *See* Sowell v. Vose, 941 F.2d 32, 35 (1st Cir. 1991).

46. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969).

47. *See* Howland v. Kilquist, 833 F.2d 639, 641-42 (7th Cir. 1987).

48. *See* Gittens v. Sullivan, 848 F.2d 389, 390 (2d Cir. 1988); *see also* Jones v. Smith, 784 F.2d 149, 152 (2d Cir. 1986).

49. *See* Foster v. Basham, 932 F.2d 732, 734-35 (8th Cir. 1991) (per curiam).

50. For a detailed discussion concerning a prisoner's rights of access to the courts, see MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 11 (2d ed. 1993).

51. Procunier v. Martinez, 416 U.S. 396, 419 (1974). *See also* Dreher v. Sielaff, 636 F.2d 1141, 1146 (7th Cir. 1980). ("An inmate's opportunity to confer with counsel is a particularly important constitutional right.").

52. *See, e.g.*, Divers v. Dep't of Corrections, 921 F.2d 191, 193-94 (8th Cir. 1990) (per curiam).

53. *See, e.g.*, U.S. v. Stotts, 925 F.2d 83, 87-90 (4th Cir. 1991).

54. *See, e.g.*, Solomon v. Zant, 888 F.2d 1579, 1581-82 (11th Cir. 1989).

55. 895 F.2d 608 (9th Cir. 1990).

56. *Ching*, 895 F.2d at 610.

57. *Id.* at 609.

violated.[58] The Ninth Circuit cited a Seventh Circuit case[59] and concluded that a prisoner's opportunity to communicate privately with his attorney exemplified an important part of the constitutionally mandated meaningful access.[60]

B. REASONABLE RESTRICTION OF ACCESS TO THE COURTS

Prison administrators may regulate an inmate's activities "from sundown to sundown, sleeping, walking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others."[61] These regulations can lawfully deprive a prisoner of his right to freedom from confinement,[62] but may also unduly infringe upon a prisoner's retained constitutional rights.[63] Courts will intervene when the latter happens.[64]

1. *Earlier Role of Courts Regarding Prisoners' Complaints*

Prior to the civil rights movements of the 1960s, courts had kept their "hands off" prisoners' complaints.[65] The ju-

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58. *Id.*

59. Dreher v. Sielaff, 636 F.2d 1141 (7th Cir. 1980).

60. *Ching*, 895 F.2d at 609-10.

61. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting) (citing Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972)).

Numerous additional activities may be regulated under an individual state's prison policies. *See, e.g.*, Idaho Dep't of Corrections, Policy and Procedure Manual 318-C, Attachment A (1987) (listing 83 prohibited actions, including quitting a prison job without approval, tattooing, sexual activity, insolence, lying, and trading property); Indiana Dep't of Corrections, Administrative Procedures, Manual of Policies and Procedures, Admin. Procedures No. 02-02-101, Appendix 1 (1983) (proscribing 80 types of acts, such as rioting, murder, wearing a disguise, creating a dummy, and being untidy).

62. Vitek v. Jones, 445 U.S. 480, 493 (1980).

63. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95-97 (1987) (finding that the prison regulation violated a prisoner's fundamental right to marry); Cruz v. Beto, 405 U.S. 319, 322 & n.2 (1972) (per curiam) (holding that a prisoner had a limited First Amendment right to free exercise of religion).

64. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

65. Although courts recognized that a prisoner retained certain rights after incarceration as early as the 1940's, *see, e.g.*, Ex Parte Hall, 312 U.S. 546 (1941), courts were reluctant to intervene on behalf of prisoners. For a general discussion

dicial attitude of nonintervention in prison matters is attributable to the system of separation of powers, lack of judicial expertise, and fear of undermining the authority of correction officers.[66]

Courts' attitude toward prisoners' complaints about their penitentiary conditions started to transpose in the mid-1960s.[67] However, the courts offered no elaboration of general guidance for scrutinizing a prison regulation.[68]

2. *Wolff v. McDonnell: Development of a "Mutual Accommodation" Standard*

In 1974, in *Wolff v. McDonnell*,[69] the United States Supreme Court attempted to reach a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution . . . of general application."[70] Prisoners at a Nebraska facility complained that the revocation of good-time credit[71] procedure violated their due process rights, the inmate legal assistance program did not meet constitutional standards, and the regulations governing inmates' mail were unconstitutionally restrictive.[72] The Court was quick to acknowledge a prisoner's entitlement to constitutional protection[73] and his liberty interest in good-

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of the "hands-off" doctrine and the demise of the doctrine, see MICHAEL MUSHLIN, RIGHTS OF PRISONERS §1.02 and § 1.03 (2d ed. 1993).

In Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951), the court rejected an inmate's challenge of a regulation forbidding inmates from transacting businesses, because "it [was] well settled that it [was] not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who [were] illegally confined." *Id.* at 851-52.

66. *See* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 11.4.1 (4th ed. 1990); *see also*, Comment, *Beyond the Ken of the Courts: a Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963), for a critique of the hands-off doctrine; JIM THOMAS, PRISONER LITIGATION 86-90 (1988), for a discussion of the factors accounting for the demise of the hands-off doctrine.

67. *See* Cassak, *supra* note 25.

68. *Id.*

69. 418 U.S. 539 (1974).

70. *Wolff*, 418 U.S. at 556.

71. "Good time" credit is awarded for good conduct and reduces the period of sentence that a prisoner must spend in prison although it does not reduce the period of the sentence itself. BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

72. *Id.* at 542-43.

73. *Wolff*, 418 U.S. at 555 (citing Ex Parte Hull, 312 U.S. 546 (1941); Haines

time credits.[74] But, "some amount of flexibility and accommodation" was necessary[75] because of "the nature of the regime to which [prisoners] have been lawfully committed."[76] Consequently, the Court suspended a prisoner's rights of cross-examination and assistance of counsel at disciplinary proceedings, in light of the prison's interests in reducing confrontation between staff and inmate[77] and maintaining the "disciplinary process as a rehabilitation vehicle."[78]

Though driving for a "mutual accommodation" between the institutional needs and prisoners' constitutional rights, the Court once again failed to intervene on behalf of the prisoners and left the final decisions "to the sound discretion of the officials of state prisons."[79]

3. *Turner v. Safley: Adoption of a "Reasonable Relation" Standard*

In 1987, the United States Supreme Court, in *Turner v. Safley*,[80] granted review of two Missouri prison policies and established a "reasonableness" standard for reviewing a challenge of prison regulations.[81]

The *Turner* Court struck down the Missouri prison's marriage restriction while upholding the regulation which barred inmate-to-inmate correspondence.[82] At all Missouri prisons, inmates were permitted to correspond with other inmates if the corresponding party was a family member or

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v. Kerner, 404 U.S. 519 (1972); Younger v. Gilmore, 404 U.S. 15 (1971); Wilwording v. Swenson, 404 U.S. 249 (1971); Johnson v. Avery, 393 U.S. 483 (1969); Lee v. Washington, 390 U.S. 333 (1968); Cooper v. Pate, 378 U.S. 546 (1964); Screws v. United States, 325 U.S. 91 (1945)).

74. *Id.* at 557.
75. *Id.* at 566.
76. *Id.* at 556.
77. *Id.* at 563.
78. *Wolff*, 418 U.S. at 568.
79. *Id.* at 569.
80. 482 U.S. 78 (1987).
81. *Turner*, 482 U.S. at 81.
82. *Id.* at 91.

if the corresponding subject concerned legal matters.[83] Other inmate-to-inmate correspondence was subjected to review of inmates' behavioral history and psychological state.[84] Also, an inmate could marry only upon demonstration of "compelling reasons to do so"[85] and upon "permission of the superintendent of the prison."[86]

The Supreme Court in *Turner* began its analysis by enumerating two fundamental principles.[87] First, since the prisoners retain certain constitutional rights, they can have cognizable constitutional claims.[88] Second, courts shall accord deference to prison authorities in prison administration.[89] After reviewing its decisions on prisoners' rights in the 1970s and early 1980s,[90] the Court formulated a standard of review of prisoners' constitutional claims: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[91]

The Supreme Court identified four factors to determine

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83. *Id.* at 81.

84. *Id.* at 82.

85. *Id.* Pregnancy and the birth of an illegitimate child have been considered "compelling reasons" to approve a marriage. *Id.*

86. *Turner,* 482 U.S. at 82.

87. *Id.* at 84.

88. *Id.*

89. *Id.* at 84-85.

90. The Court discussed five cases: Procunier v. Martinez, 416 U.S. 396 (1974) (reserving the question of standard of review for prisoners' complaint about mail censorship—the case turned on the fact that mail censorship restricted a non-prisoner's First Amendment rights of free speech); Pell v. Procunier, 417 U.S. 817 (1974) (holding that the ban on inmates' face-to-face interviews with media was not unconstitutional in consideration of prison security and noting that judgments on prison security were within the expertise of the correctional officers and should have been given deference by the courts); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (finding the regulation concerning prisoner's labor union activities was reasonably related to the objectives of prison administration); Bell v. Wolfish, 441 U.S. 520 (1979) (finding a regulation that prohibited prisoners from receiving hardback books from sources other than publishers, book clubs, or book stores was a "rational response" to prison security problems); Block v. Rutherford, 468 U.S. 576 (1984) (upholding a policy which denied pretrial detainees contact visits with family members and friends because prison administrators in their sound discretion had determined that such visits would jeopardize the facility's security).

91. *Turner,* 482 U.S. at 89.

the reasonableness of a prison regulation. Courts should consider (1) whether a "valid, rational connection" exists between the prison regulation and the legitimate governmental interest put forward to justify it;[92] (2) whether alternative means for exercising the asserted right remain available;[93] (3) whether accommodation of the asserted right will adversely affect guards, other inmates, and allocation of prison resources generally;[94] and (4) whether there is an obvious alternative to the regulation which "fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[95]

Applying these four factors, the Court concluded that the inmate-to-inmate correspondence regulation was reasonably related to prevention of inmates from communicating escape plans, plotting violent activities, and organizing prison gangs.[96] Furthermore, Missouri regulation did not deprive a prisoner of all means of communication because it only limited his correspondence with other inmates.[97] The alternatives, such as monitoring every piece of inmate mail, would require "more than de minimis cost."[98]

The *Turner* Court struck down the marriage regulation which prohibited inmates from marrying unless the prison superintendent had approved the marriage upon a finding of compelling reasons for doing so.[99] The Court explained that an inmate retained her right to marry, even though such a right was subject to "substantial restrictions."[100] Prison officials' fear of "love triangles" causing violent con-

92. *Id.* at 89.
93. *Id.* at 90.
94. *Id.*
95. *Id.* at 90-91.
96. *Turner,* 482 U.S. at 91-92.
97. *Id.* at 92-93.
98. *Id.* at 93. The Federal Bureau of Prisons has adopted a substantially similar restriction on inmate correspondence. *See* 28 C.F.R. § 540.17 (1986).
99. *Turner,* 482 U.S. at 99. The Court noted that regulating marriage may also entail a consequential restriction on the constitutional rights of non-prisoners. *Id.*
100. *Id.* at 95 ("[A] prisoner's marriage right is subject to substantial restrictions.").

frontations,[101] and of female prisoners being abused or becoming "overly dependent,"[102] represented an "exaggerated response" to security and rehabilitation concerns.[103]

IV. THE COURT'S ANALYSIS

A. THE MAJORITY OPINION

In *Casey v. Lewis*,[104] the Ninth Circuit followed the deferential standard articulated by the United States Supreme Court in *Turner v. Safley*[105] and concluded that the non-contact visitation policy of the Arizona Department of Correction[106] was constitutional because it was reasonably related to legitimate penological interests.[107]

The Ninth Circuit reiterated its holding from *Ching v. Lewis*,[108] that a prisoner's right of meaningful access to the courts "include[d] contact visitation with his counsel."[109] However, the Ninth Circuit maintained that *Ching*'s holding merely began the inquiry presented in *Casey*: whether the denial of attorney-inmate contact visits has "unnecessarily"[110] abridged a prisoner's meaningful access to the courts.[111] Without elaboration, the Ninth Circuit placed the burden on prisoners to show that the non-contact visitation policy was unreasonable under the *Turner* factors.[112]

The Ninth Circuit analyzed each *Turner* factor, emphasizing the prisoners' burden to prove each factor.[113] First,

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101. *Id.* at 97-98.
102. *Id.* at 98.
103. *Turner*, 482 U.S. at 97-98.
104. 4 F.3d 1516 (9th Cir. 1993) (opinion by Farris, J., joined by Goodwin, J.; partial concurrence and partial dissent by Pregerson, J.).
105. 482 U.S. 78 (1987).
106. *See supra* note 3 for the relevant text of the policy.
107. *Casey*, 4 F.3d at 1523.
108. 895 F.2d 608, 610 (9th Cir. 1990).
109. *Id.*
110. It seems that the *Casey* majority has used "unnecessarily" and "unreasonably" interchangeably.
111. *Casey*, 4 F.3d at 1520.
112. *Id.*
113. *Id.* The Ninth Circuit maintained that the prison officials should not be

the Ninth Circuit found a rational relation between the non-contact visit policy and the prison administration's concerns of escape, assault, hostage-taking, and the introduction of contraband.[114] The court based its finding on a prison official's belief;[115] a belief to which the court has accorded "significant" deference."[116]

Second, the Ninth Circuit held that the inmates barred from contact visits "were not denied all means of expression of their rights of meaningful access,"[117] because "adequate law libraries" or "adequate assistance from persons trained in the law" provided them with alternative avenues.[118]

Third, the Ninth Circuit insisted that the inmates produce evidence concerning the impact that accommodations would have on guards, other inmates, and the allocation of prison resources.[119]

Finally, the prisoners suggested that, as an alternative to a total ban on contact visits, they be searched before and after each visit and be observed during the visit.[120] The Ninth Circuit rejected the proposal because it did not satisfy all of the prison officials' security concerns.[121]

The Ninth Circuit concluded that the "rational relation"

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placed under "an unduly onerous burden" and that "[a] prison official's concern for prison security is entitled to significant deference." *Id.* at 1521.

114. *Id.*

115. *Id.* (The prison Warden's testimony "demonstrate[d] his belief that contact visits between inmates and their attorneys create[d] an intolerable risk of a security breach.").

116. *Casey*, 4 F.3d at 1521.

117. *Id.* at 1522 (quotation omitted).

118. *Id.* The Ninth Circuit noted that a triable issue remained as to whether the inmates' rights of access were satisfied by adequate libraries or other assistance, but refused to remand for trial "because resolution of this factor in favor the inmates would not alter our ultimate legal conclusion - that the *Turner* test of reasonableness is satisfied." *Id.*

119. *Id.* at 1522. The Ninth Circuit found no need for remanding for trial on the issue of impact of accommodation because "the resolution of this factual dispute in favor of the prisoners would not weigh heavily in [its] analysis." *Id.*

120. *Id.* at 1523.

121. *Casey*, 4 F.3d at 1523.

factor of the *Turner* analysis was determinative.[122] Thus, the court granted summary judgment for the Arizona Department of Correction, rejecting the claim that triable issues remained as to the availability of alternative means of access, the impact of accommodating the contact visits on prison resources, and the adequacy of the prison's response to its security concerns.[123]

The Ninth Circuit attempted to harmonize its holding with its prior decision in *Ching* that a prisoner's right of access to the courts included contact visitation with his attorney. It explained that *Ching* merely demonstrated that "rational relationship" was a "necessary, though not necessarily sufficient," factor to sustain a prison policy abridging a prisoners' constitutional rights."[124]

B. JUDGE PREGERSON'S DISSENT

After depicting in detail the physical condition of non-contact visits at different Arizona facilities, Judge Pregerson addressed several rationales for his dissent.[125] Judge Pregerson stated that the majority erred in "allocat[ing] to the prisoners the burden of disproving the prison officials' asserted justifications for the policy"[126] and in "rush[ing] to defer to prison officials."[127] Additionally, Judge Pregerson believed that the majority narrowed the right of access to the courts by holding that prison officials may bar a prisoner's contact visits with his attorney as long as they have maintained a well-stocked library.[128]

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122. *Id.*

123. *Id.* at 1523, 1524-25. The Ninth Circuit reviewed the district court's summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party, to determine whether genuine issues of material fact existed. *Id.* at 1518. The court also reviewed whether the district court had applied the substantive law correctly. *Id.*

124. *Id.* at 1523.

125. Casey v. Lewis, 4 F.3d 1516, 1526-27 (9th Cir. 1993) (Pregerson, J., concurring in part, dissenting in part). Judge Pregerson concurred in the majority's disposition of the policy prohibiting HIV-positive individuals from food-service employment in the prison because the prisoners lacked standing. *Id.* at 1525.

126. *Id.* at 1528.

127. *Id.*

128. *Id.* at 1528, 1530. Judge Pregerson dissented also because the majority had

1. *Erroneous Allocation of Burden of Proof*

Judge Pregerson challenged the majority's view that the burden of justifying a prison regulation falls on prisoners,[129] and argued that the Ninth Circuit precedent "repeatedly" insisted upon the prison officials to "demonstrate an adequate justification" for the regulation that implicates a constitutional guarantee.[130]

Judge Pregerson noted that although the United States Supreme Court has not ruled directly on the burden bearing issue,[131] the Supreme Court has relied on prison officials' presentation of evidence to justify a regulation that injures an inmate's constitutional interests.[132]

Judge Pregerson read the two out-of-circuit decisions cited by the majority as "mischaracteriz[ing] Supreme Court decisions."[133] In *Covino v. Patrissi*,[134] the Second Circuit quoted a long passage from the Supreme Court's decision in *O'Lone v. Estate of Shabazz*,[135] to support its assertion

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credited unsupported allegations in violation of Rule 56 of the Federal Rules of Civil Procedure. *Casey*, 4 F.3d at 1525. Judge Pregerson opposed the majority's sua sponte grant of summary judgment in favor of prison officials, because he believed a triable issue of the "actual" reasons for the non-contact policy remained. *Id.* at 1540.

129. Casey v. Lewis, 4 F.3d 1516, 1527-28 (9th Cir. 1993) (Pregerson, J., dissenting).

130. *Id.* at 1528. Judge Pregerson discussed three cases: Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990) (holding that prison authorities needed "evidentiary showing" that the asserted interests were the actual bases for the challenged policy and that the policy was reasonably related to the furtherance of the interests); Swift v. Lewis, 901 F.2d 730, 732 (9th Cir. 1990) (holding that the prison officials must produce evidence to justify the challenged policy); Tribble v. Gardner, 860 F.2d 321, 325 n.6 (9th Cir. 1988) (requiring the government to show a rational relation between the asserted interest and the challenged policy), *cert. denied*, 490 U.S. 1075 (1989).

131. *Casey*, 4 F.3d at 1528. In Thornburgh v. Abbott, 490 U.S. 401, 414 n.12 (1989), the United States Supreme Court expressly reserved comments on the burden of proof issue.

132. *Casey*, 4 F.3d at 1529 (discussing Turner v. Safley, 482 U.S. 78, 98 (1987) and Thornburgh v. Abbott, 490 U.S. 401 (1989)).

133. *Id.* at 1529-30 (discussing Covino v. Patrissi, 967 F.2d 73, (2d Cir. 1992) and Abdullah v. Gunter, 949 F.2d 1032 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1995 (1992)).

134. 967 F.2d 73 (2d Cir. 1992).

135. 482 U.S. 342 (1987).

that the burden fell on the prisoners to justify a prison's policy.[136] Judge Pregerson contended that the *O'Lone* language did not "absolve the [prison officials] of any burden of proof."[137] Rather, he believed that the language attempted to resolve the issue of how great a burden prison officials should bear.[138]

In *Abdullah v. Gunter*,[139] the Eighth Circuit imposed upon prisoners the burden of justifying a challenged policy.[140] Unlike the Second Circuit's reliance on a lengthy passage, the Eighth circuit rested its decision on a simple citation to *Turner*.[141] Judge Pregerson found "nothing at [the cited page in *Turner* could] be construed as support for allocating to prisoners the burden of disproving the state's justification for a challenged regulation."[142]

2. *Departure from Turner's Reasonableness Standard*

Judge Pregerson agreed with the majority that the constitutionality of a prison policy should be tested against the four factors delineated in *Turner*.[143] However, he

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136. *Covino*, 967 F.2d at 79. The quoted passage reads:

> We think the Court of Appeals decision in this case was wrong when it established a separate burden on prison officials to prove that no reasonable method exists by which prisoners' religious rights can be accommodated without creating bona fide security problems. Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that prison officials have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.

Id.

137. *Casey*, 4 F.3d at 1530.

138. *Id.* Judge Pregerson advised that "a close reading demonstrates that *O'Lone* merely reiterated *Turner*'s holding that prison officials are not required to pass the separate 'least restrictive means' test to justify a regulation." *Id.* (quoting Turner v. Safley, 482 U.S. 78, 90-91 (1987)).

139. 949 F.2d 1032 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1995 (1992).

140. *Abdullah*, 949 F.2d at 1035.

141. *Id.* (citing *Turner*, 482 U.S. at 89).

142. *Id.* Judge Pregerson mentioned that the Ninth Circuit's approach prior to this decision was consistent with the Seventh Circuit's holding in Caldwell v. Miller, 790 F.2d 589, 598 (7th Cir. 1986) (denying a motion for summary judgment based on prison officials' conclusory affidavits). *Casey*, 4 F.3d at 1530 n.4.

143. Casey v. Lewis, 4 F.3d 1516, 1530 (9th Cir. 1993) (Pregerson, J., dissent-

maintained that by burdenening prisoners with the justification of a regulation and by substituting the attorney-inmate contact visits with law libraries, the majority "ha[d], in effect, abandoned the *Turner*'s reasonableness standard of review."[144]

First, Judge Pregerson criticized the majority's attempt "to salvage the prison official's case."[145] Judge Pregerson believed the majority's finding of a "rational relation" between the non-contact visit policy and legitimate interests was not supported by the record,[146] logic,[147] or common sense.[148] Emphasizing the distinction between the deference due to prison officials' expertise and their burden to justify a regulation allegedly in violation of a prisoner's constitutional rights,[149] Judge Pregerson asserted that "deference does not mean abdication."[150] Deference came after the officials had produced actual reasons for implementing a constitutionally injurious regulation.[151]

Second, Judge Pregerson believed that the majority narrowed a prisoner's rights of access to the courts. Correspon-

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ing). See also *supra* notes 80-103 and accompanying text for a discussion of Turner v. Safley, 482 U.S. 78 (1987).

144. *Casey*, 4 F.3d at 1525.

145. *Id.* at 1531.

146. After examining the prison officials' affidavits, Judge Pregerson concluded that they lacked both specificity and personal knowledge and failed to evidence the "actual reason for imposing the ban" of contact visits. *Id.* at 1531-32.

147. Judge Pregerson saw the selection of prison units to implement the policy as a reflection of its arbitrariness. Those units affected by the policy housed not only the "most dangerous prisoners in Arizona system" but also prisoners awaiting to be returned to the community. *Id.* at 1533. A particular prisoner's security risk was disregarded. *Id.*

148. *Id.* at 1534 ("Common sense tells us that family members are more likely to pass contraband to a prisoner or aid in a prison escape than are officers of the court.").

Judge Pregerson also noted that although the barriers were erected between the prisoners and their attorneys, they were removed when prisoners visited with their family members and other fellow inmates. For instance, some death-row inmates at CB6 may have contact visits with families. *Id.* Prisoners may also be visited by an inmate legal assistant if they were not so bizarre or hostile to "pose a threat to the safety of officers or inmates involved." *Id.* (citing ADOC Internal Management Policy 302.11 § 6.1.10 (1992)).

149. *Casey*, 4 F.3d at 1535.

150. *Id.* (citing Walker v. Sumner, 917 F.2d 382, 385-86 (9th Cir. 1990)).

151. *Id.*

dence, barriered visitation, and non-monitored telephone calls could not substitute contact visits because it would make "the most rudimentary of communications become . . . cumbersome and frustrating."[152]

However, what was more "startling" to Judge Pregerson was the majority's holding that "adequate libraries or other assistance" could substitute an attorney's services.[153] The historical parameters of the access right and the Supreme Court's decision in *Procunier v. Martinez*[154] foreclosed such a reading of *Bounds v. Smith*.[155] According to Judge Pregerson, *Bounds* imposed the provision of libraries or legal assistance, in one form or another, as "additional measures" to assure meaningful access to the courts.[156] Judge Pregerson feared that the majority's interpretation of *Bounds*, namely that an adequate library would satisfy the right of access to the courts, may lead to substitution of a prisoner's Sixth Amendment counsel[157] with law books and

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152. *Id.* at 1536-37 (arguing that a contact visit allows attorneys to "assess their clients' demeanor and credibility, and to establish a rapport with their clients.").

153. *Id.* at 1537. See also *supra* notes 117-18 and accompanying text for a discussion of the Majority's opinion on this issue.

154. 416 U.S. 396 (1974) (invalidating a California prison regulation which barred law students and paralegals employed by lawyers from visiting their prisoner-clients in spite of the fact that the prison had law libraries and inmate legal assistance).

155. 430 U.S. 817, 828 (1977). *See also supra* notes 37-50 and accompanying text for a detailed discussion of *Bounds v. Smith*.

156. *Casey*, 4 F.3d at 1537-38.

157. The Sixth Amendment of the United States Constitution provides in part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Sixth Amendment right to counsel is limited to criminal prosecutions. Townsend v. Sain, 372 U.S. 293, 311-12 (1963).

However our courts have "'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827 (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969); Wolff v. McDonnell, 418 U.S. 539, 579 (1974)); *see also* Raymond Y. Lin, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1279 n.6 (1983) (attempting to explain the concept of "attorney assistance" under the constitutionally protected right of access to the courts); Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 472-76 (1989) (discussing attorney assistance in civil cases under the due process right to access courts).

prisoner paralegals.[158]

Finally, Judge Pregerson contended that the majority had slighted the prisoners' suggestions in its determination of no "exaggerated response" to security concerns.[159] Judge Pregerson recommended that the prison administration attach a condition based on a prisoner's behavior to the privilege of contact visits.[160]

Ultimately, Judge Pregerson averred that the majority's position "sets back our constitutional jurisprudence fifty years."[161]

V. CRITIQUE: AN UNBEARABLE BURDEN FOR A PRISONER

In *Casey v. Lewis*,[162] the Ninth Circuit raised the issue of whether denial of a prisoner's contact visits with his attorney violates his Fourteenth Amendment right of meaningful access to the courts.[163] While the Ninth Circuit maintained that the right of access to the courts embraces the attorney-inmate contact visitation,[164] its conclusion that prisoners bear the burden to establish unreasonableness of the challenged regulation and that a well-stocked law library may substitute attorney-inmate contact visitation as

158. *Casey*, 4 F.3d at 1538.

159. *Id.* In regard to the impact that accomodation of the prisoner's access rights would have on guards, other prisoners, and prision resources, Judge Pregerson ascribed the majority's error to its allocation of the burden of proof on prisoners. *Id.* at 1539. Prisoners suggested alternatives to a total ban on contact visits, such as searching the attorney, the prisoner, and the visitation room prior to all visits; escorting the prisoners to and from the visitation rooms with hands chained to waists; and having guards observe the visits. *Id.* They asserted that these were current security measures for visitation and were ready alternatives to meet the security concerns asserted by prison officials. *Id.*

160. *Id.* at 1540. Such conditions have already been implemented at certain units. Contact visits will be suspended if the prisoner's "behavior is so bizarre or the inmate's hostility is so extreme that personal contact would pose a threat to the safety of officers or inmate involved." ADOC Internal Management Policy 302.11 § 6.1.10 (1992).

161. *Casey*, 4 F.3d at 1541.

162. 4 F.3d 1516 (9th Cir. 1993).

163. *Id.* at 1520.

164. *Id.*

an alternative access means is very troubling.

A. WHO SHOULD HAVE THE BURDEN OF JUSTIFYING A PRISON REGULATION?

The Ninth Circuit held that the inmates bear the burden "to show that the challenged regulation is unreasonable under *Turner*."[165] In so holding, the Ninth Circuit places a practically unattainable burden on prisoners to establish that a prison regulation violates their constitutionally protected rights.

1. *Deference, Not Abdication*

Judge Pregerson opens his dissent, in *Casey*, by addressing the dispute regarding who bears the burden to justify a prison regulation.[166] The disparity between the majority and Judge Pregerson may result from equivocal Supreme Court decisions. Even though it had previously mandated that prison officials "put forward" legitimate governmental interests to justify their regulations,[167] the court seemed to retract from its position in *O'Lone v. Estate of Shabazz*.[168] It excused the prison officials from "disapproving of the availability of alternatives" fearing that such a requirement would not "reflect the respect and deference . . . for the judgment of prison administrators."[169] However, the *O'Lone* court did not definitely allocate such a burden on prisoners.[170] The Supreme Court has reserved the issue for future discussion.[171]

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165. Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993) (citing Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992); Abdullah v. Gunter, 949 F.2d 1032 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1995 (1992)).

166. Casey v. Lewis, 4 F.3d 1516, 1528-30 (9th Cir. 1993) (Pregerson, J., concurring in part and dissenting in part).

167. Turner v. Safley, 482 U.S. 78, 89 (1987).

168. 482 U.S. 342 (1987).

169. *Id.* at 350.

170. In *O'Lone*, 482 U.S. at 350, the Court held that the prison officials had no "separate burden" to "set up and shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." In applying the *Turner* factors, the *O'Lone* Court relied primarily on the prison officials' testimony to decide the constitutionality of a challenged regulation. *Id.* at 351-53.

171. Thornburgh v. Abbott, 490 U.S. 401, 414 n.12 (1989) (abstaining on the

Further, although the Supreme Court urges deference to the opinions of the prison authorities in prison administration,[172] it has shown reluctance to rely totally on their discretion.[173] The Court qualified the deference by requiring that it be "appropriate."[174]

The Ninth Circuit has allocated to prison officials some responsibility in vindicating a challenged regulation. In *Walker v. Sumner*,[175] the Ninth Circuit plainly remarked that "deference [did] not mean abdication" of prisons' burden to justify their regulations.[176] The court deferred to the officials' judgment "only after prison officials have put forth [justification] evidence."[177] Otherwise, the "judicial review of prison policies would not be meaningful."[178]

2. *A Further Confusion*

In addition to the confusion of who bears the burden of justifying a prison policy, courts differ as to what proof a prisoner must offer to demonstrate the unreasonableness of

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question raised by the district court's holding that the prison needed to articulate the relation between its regulation and legitimate penological objectives before the burden was shifted back to the prisoners to show an "exaggerated response").

172. *See O'Lone*, 482 U.S. at 353. The *O'Lone* Court refused to "substitute [its own] judgement . . . on difficult and sensitive matters of institutional administration." *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).

173. *See Turner*, 482 U.S. at 97-98 (declining to enforce a prison regulation which offended a prisoner's constitutional rights because the reasons advanced by the prison were "exaggerated responses" to its concerns).

In the beginning, such reluctance was voiced mostly in dissenting opinions. In Wolff v. McDonnell, 418 U.S. 539, 586 (1974), Justices Marshal and Brennan discredited the prisons' concern of administrative efficiency as "trivial" when weighed against prisoners' "fundamental" rights. Justice Douglas, while acknowledging the prisons' security concern was "real and important," opposed granting "unreviewable discretion" to prison authorities. *Id.* at 598, 600. Justice Douglas analogized the placement of inmates' constitutional rights in the hands of the prison administrators to placement of a defendant's rights in the hands of a prosecutor. *Id.* at 601. Justice Brennan, in *O'Lone*, 482 U.S. at 367-68, explicitly demanded a "firmer ground" than mere assertions of prison officials for a finding of reasonableness.

174. *O'Lone*, 482 U.S. at 349.

175. 917 F.2d 382 (1990).

176. *Id.* at 385-86.

177. *Id.* at 386.

178. *Id.* (citing Swift v. Lewis, 901 F.2d 730, 732 (9th Cir. 1990)).

a challenged policy. In *Pell v. Procunier*,[179] the Supreme Court wanted "substantial evidence" to show that the officials had exaggerated their response to security considerations.[180] Some observed the comment in *Pell* as an imposition of a high burden of proof on prisoners.[181] Others have interpreted *Pell*'s remarks as a requirement that prisoners must prove the unreasonableness of a prison regulation.[182] Although the majority in *Casey* did not allude to *Pell* or its progeny as authority, it followed them in essence, requiring the prisoners to justify a regulation possibly violative of their constitutional rights.[183]

3. *An Impossible Legal Burden*

The requirement that prisoners prove the unreasonableness of a prison regulation creates a legal hurdle impossible for prisoners to overcome. First, inmates are less knowledgeable about the institutional operations than their keepers.[184] Although the institution may not be physically too sizable to measure,[185] it is "a complex . . . of measures, all wholly governmental, all wholly performed by agents of

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179. 417 U.S. 817 (1974) (upholding prison regulation forbidding media interviews with individual inmates).

180. *Id.* at 827.

181. *See, e.g.*, Matthew P. Blischak, Note, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 462 n.46 (1988) (stating that the *Pell* opinion implied "a high burden of proof on the prisoners to show that the restrictions were unconstitutional"); Joseph C. Hutchinson, *Analyzing The Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones, and Wolfish*, 11 N.Y.U. REV. L. & SOC. CHANGE 413, 425 (1982-83) (observing that deference to prison officials' judgment resulted in the placement of a high burden of proof on prisoners in *Pell*).

182. *See, e.g.*, United States v. Huss, 394 F. Supp. 752, 762, *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975).

183. Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993). The Ninth Circuit cited Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) and Abdullah v. Gunter, 949 F.2d 1032 (8th Cir. 1991) without paraphrase or discussion. *See supra* notes 134-42 and accompanying text for a discussion of these two cases.

184. Courts have repeatedly held that the institutional operations are within the particular knowledge and expertise of the prison authorities. *See* Turner v. Safley, 482 U.S. 78, 84-85 (1987); *see also* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

185. California has the biggest prison system, which has 8% of the nation's population and 13% of the country's prison inmates. Sharon LaFraniere, *Influx of Inmates Floods California*, THE WASHINGTON POST, April 27, 1991, at A3.

government, which determine the total existence of certain human beings. . . ."[186] It is a "separate netherworld, driven by its own demands, [and] ordered by its own customs."[187] A prisoner with a 12th grade education cannot easily understand and accurately describe the intricacy of a prison.[188]

Second, prisoners can reasonably foresee that living behind bars will inevitably alter virtually every right enjoyed by a free citizen,[189] but may not utterly understand that the alteration has its boundary and that certain governmental measures have trespassed constitutional boundaries.[190] Prisoners are expected to obey the institutional measures, not to reason and test them.[191]

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186. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (citing Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972)).

187. *Id.* One commentator described today's prison as "a policy community within a policy society [which] provides rules and budgets" and analogized the prison to a corporation, concerned with "the organization of custody." Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 114-115 (1987).

188. Federal Prison Admissions

Education Level	*Percentage*
8th grade or less	17.0
8th to 11th Grade	28.0
High School Graduate	50.3
Some College	4.7
Other	Less than 0.05%
Median Education	12th Grade

BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 6.86 (1992).

189. *See supra* note 61 for examples of prison regulations.

190. Two prisoners serving life terms at the Louisiana State Penitentiary spoke from their experience:

> American prisons are filled with people who are poor and uneducated, with a substantial number being functionally illiterate. As a class, prison inmates have very little knowledge and understanding of law. They perceive it, in a narrow sense, as the power of the system; a power that is enforced by the police, prosecutors, and judges. By perception they understand that the law is applied markedly different to those at the top of the social structure than to those at the bottom.

Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1061 (1985).

191. Certain prison regulations prohibit prisoners from writing, circulating, or signing a petition that threatens institutional security, *see* Idaho Dep't of Correc-

The court's emphasis on affording substantial deference to prison officials' assessments of institutional needs and interests would necessarily place the prisoners at a disadvantage. While the prison officials need not even offer "one scintilla of evidence" to support their belief that prisoners' activities would disrupt operation of the prison,[192] prisoners must offer "substantial evidence" to demonstrate a deprivation of their constitutional rights.[193]

An application of the *Turner v. Safley* factors places the problem into sharp focus.[194] *Turner* first looks at a rational connection between a prison regulation and any legitimate governmental interest.[195] While being governed by certain regulations, prisoners may be ignorant of the institution's precise reasons for adopting the regulations.[196] Even if they are informed of the rationale, they cannot rationalize a regulation which injures their interests. In contrast, prison officials' perception of the entire operation enables them to "put forward" government interests to justify the challenged regulation.[197]

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tions, Policy and Procedure Manual 318-C, Attachment A (1987), and from participation in an unauthorized organization, *see* OR. ADMIN. R. 291-105-0015, at 3-4 (1989).

"Punishment was at the full discretion of the warden and inmates had no opportunity to challenge the charges." TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 385 (2d ed. 1990).

192. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 127 n.5, 128 (1977). In *Jones*, the Court deferred to the prison official's opinion that the exercise of a prisoner's First Amendment right would disrupt prison discipline. *Id.* at 128-29. The Court reasoned that requiring a high showing would unnecessarily burden the operation of the prison. *Id.* at 128.

The Jones's Court opinion has drawn criticism. *See* Emily Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219, 220, 234 (1977); *see also* Comment, *The Future of Prisoners' Unions: Jones v. North Carolina Prisoners' Labor Union*, 13 HARV. C.R.-C.L. L. REV. 799, 803-04 (1978).

193. *See* Pell v. Procunier, 417 U.S. 817, 827 (1974).

194. *See supra* notes 92-95 and accompanying text for a discussion of the four *Turner* factors.

195. Turner v. Safley, 482 U.S. 78, 89 (1987).

196. Prisoners shall be provided with a copy of rules upon entry to the institution. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, § 23-3.1 (1983).

197. *See* Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990); *see also supra* notes 184-87 and accompanying text describing the prisoners' disadvantage in challenging a prison regulation.

Turner next considers the alternative means of exercising the impaired right.[198] As the *Casey v. Lewis* court maintained, no dispute arises as long as the inmates are "not denied all means" of access.[199] Thus, a prisoner who questions the non-contact visitation policy must predict and assess the "alternative avenues" the prison officials will submit. Because of the prison officials' expertise,[200] the court's substantial deference to the prison official's opinions,[201] and the prisoners' lack of information,[202] the prisoner can hardly prevail.[203]

Third, a determination of the reasonableness of a regulation requires an assessment of the "ripple effect" on prison personnel and resources.[204] It is hard to imagine that a prisoner can appraise prison resources, let alone their proper allocation. The availability and allocation of prison personnel and resources are well within the jurisdiction of prison administration.[205]

The final factor of *Turner* examines whether the regulation is an "exaggerated response" to prison concerns.[206]

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198. *Turner*, 482 U.S. at 90.

199. Casey v. Lewis, 4 F.3d 1516, 1522 (9th Cir. 1993).

200. *See supra* note 184 for a list of three Supreme Court cases which have recognized prison officials' expertise in their institutional operations.

201. *See supra* note 172 for an example of the Supreme Court's deference to prison authorities.

202. *See supra* notes 184-91 describing an average prisoner's disadvantage in dealing with the legal system.

203. In 1990, federal prisoners filed 999 civil rights petitions and state prisoners filed 25,043 in the United States District Courts. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 5.76 (1992). In 1991, 4,655 prisoners filed their appeals in the United States Courts of Appeals. *Id.* at Table 5.78.

According to a Harvard study, nearly all prisoners' cases are terminated before any pretrial conference. Fewer than 5% reach the trial stage. William B. Turner, *When Prisoners Sue: A Study of Prisoners § 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 618 (1979).

The author is not unmindful of the expertise of the prisoners' counsel. However, a large percentage of prisoner civil rights lawsuits proceeds *pro se*. *Id.*

204. *Turner*, 482 U.S. at 90.

205. *Id.* at 84-85 ("Running a prison is an inordinarily difficult undertaking that requires expertise, planning, and the commitment of resources and all of which are peculiarly within the province of the legislative and executive branches of government.").

206. *Id.* at 90-91.

Turner discharges the officials' duty to "shoot down every conceivable alternative method," and charges the inmate claimants to suggest an alternative that fully accommodates the prisoner's right at de minimis cost.[207] However, this places an unattainable burden on prisoners, for officials may refute the suggestions by enumerating other security concerns or technical problems not within the realm of prisoners' knowledge. This is what happened in *Casey v. Lewis.*[208] The prisoners there suggested, as an acceptable alternative, body searches after contact visits accompanied by a guard's observation during the visits.[209] However, in the Ninth Circuit's view, they satisfied some, but not all, of the prison officials' security concerns.[210] Some of the alternatives, such as body searches, may overstep other constitutional boundaries.[211]

4. *The Proposed Solution: A Possible Legal Burden and An Affirmative Defense*

In a prisoner's action under section 1983,[212] instead of proving deprivation of a constitutional right by disproving the reasonableness of a prison regulation,[213] prisoners should simply be required to introduce facts of the officials' impropriety, sufficient to create a factual question or a *prima facie* case of deprivation.[214] The burden should shift to the government when the prisoners discharge their duty. Defense of the challenged prison regulation or action should

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207. *Id.* at 91.

208. *Casey*, 4 F.3d at 1532.

209. *Id.*

210. *Id.*

211. *See* Bell v. Wolfish, 441 U.S. 520, 560 (1979) (permitting prison officials to conduct body cavity searches of prisoners after contact visits with persons outside the prison, but emphasizing that the searches must be conducted in a reasonable manner); *see also* Sims v. Brierton, 500 F. Supp. 813, 817 (N.D. Ill. 1980) (recognizing that the body cavity search, the most intrusive and humiliating search, had the effect of discouraging a prisoner from having visits with his lawyer).

212. *See supra* note 17 for the text of section 1983 and the requirements to establish a section 1983 claim.

213. *See* Casey v. Lewis, 4 F.3d 1516, 1520 (9th Cir. 1993).

214. This accords with certain Circuit Courts' treatment of pleading a claim under 42 U.S.C. § 1983. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983: CLAIMS, DEFENSES, AND FEES § 1.6 (2d ed. 1992).

rest with the prison officials who can best argue its reasonableness.[215]

Such an allocation of the burden of proof balances: (1) the prisoners' dilemma;[216] (2) the fear of the "minor" prison claims flooding the judicial system;[217] and (3) the courts' deference to the opinions of prison officials. Since the prisoners are only burdened with the factual proof of a constitutional violation, they will not be forced to rationalize a regulation which they believe injures their constitutional interests. Without such factual proof, the court may grant a judgment for prison officials.[218]

A requirement that officials affirmatively defend a challenged regulation accords with the court's emphasis of affording deference to the prison officials' judgment. The defense provides the prison officials with an opportunity to recapitulate and reconsider the reasons for enacting the challenged regulation. This serves as a check on discretion vested in prison officials.[219]

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215. *Cf.* Nader v. Allegheny Airlines, 512 F.2d 527, 538 (D.C. Cir. 1975) (finding the burden of proof often falls on the party who "has particular knowledge or control of the evidence as to such matter"), *reversed on other grounds*, 426 U.S. 290 (1975); Trans-American Van Service, Inc. v. United States, 421 F. Supp. 308, 330 (N.D. Tex. 1976) (reasoning that once the applicant for a common carrier has proven a *prima facie* case, the existing carrier opposing the application has the burden of proving such application should be denied, for the "capability of protesting carrier are matters peculiarly within their knowledge").

216. *See supra* notes 182-93 and accompanying text discribing the prisoner's dilemma.

217. Chief Justice Burger of the United States Supreme Court once stated that "[f]ederal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resorting to federal judges." JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS, § 11.4.1 (4th ed. 1991) (citing 62 AMERICAN BAR ASSOCIATION JOURNAL 189 (Feb. 1976)).

218. The "judgment" refers to any "decree and any order from which an appeal lies." FED. R. CIV. P. 54 (examples include judgments on the pleadings, under FED. R. CIV. P. 12, and summary judgments, under FED. R. CIV. P. 56).

219. In Wolff v. McDonnell, 418 U.S. 539, 598 (1974) (Douglas, J., dissenting). Justice Douglas dissented from the Court's position that the prisoners' exercise of a fundamental constitutional rights should be left within the unreviewable discretion of prison authorities.

B. WHAT IS THE VALUE OF ASSISTANCE OF COUNSEL?

Rights of meaningful access to the courts ensure the prisoners with a forum to air their grievances.[220] Assistance of a legal counsel[221] facilitates a more efficient and skillful handling of their complaints and assures inmates of fair treatment and "protection of our most valued rights."[222] The Ninth Circuit discounts the significance of counsel's assistance when it equates an attorney's service with the presence of a law library and tolerates a physical barrier between an attorney and her inmate client during consultation.

1. *From a Prisoner's Perspective: An Empty Promise*

In *Bounds v. Smith*,[223] the Supreme Court made a sweeping promise: "prisoners have a constitutional right of access to the courts."[224] The Court further mandated that the access be meaningful[225] and the prison authorities ensure a prisoner's "meaningful access."[226] Maintaining a law library may meet the "meaningful access" mandate.[227] So may the establishment of some legal assistance programs, like:

> [T]raining of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through

220. *See supra* note 157 for a discussion on counsel's assistance in prisoner's civil lawsuits.

221. *See* Raymond Y. Lin, Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1286 (1983).

222. Bounds v. Smith, 430 U.S. 817, 827, 831 (1977). *See supra* notes 51-60 and accompanying text for a discussion on communication between attorneys and their prisoner-clients as an aspect of the constitutional rights of access to the courts.

223. 430 U.S. 817 (1977).

224. *Bounds*, 430 U.S. at 821.

225. *Id.*

226. *Id.* at 828.

227. *Id.*; *cf.* Johnson v. Moore, 948 F.2d 517, 521 (9th Cir. 1991) (holding that a library with insufficient books or an insufficient allowance for research does not provide "meaningful" access).

> bar association or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services or offices.[228]

However, what makes a particular legal access program constitutionally adequate is unclear from the *Bounds* decision.[229] The *Casey* court's assertion that an adequate library would solve the problem of inadequate attorney assistance,[230] fails to further the inquiry left unsolved by *Bounds*.[231]

In *Ching v. Lewis*,[232] the Ninth Circuit considered the issue of adequate legal assistance in the context of personal visits between attorneys and inmates.[233] The court held that the visits must be "contact" to guarantee a private communication between an attorney and her inmate client.[234] Although the *Casey* court paid lip service to *Ching*, it questioned the reasonableness of permitting contact visits[235] on prison premises and eventually denied the prisoners contact visits.[236] As Judge Pregerson declared, the court's tolerance of a barrier between attorneys and inmates "has in effect drawn an iron curtain between prisoners and

228. *Id.* at 831.

229. *Bounds*, 430 U.S. at 832 ("[A] legal access program need not include any particular element we have discussed and we encourage local experimentation. Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standard."); *see also* Lin, *supra* note 223, at 1285-86 ("Although *Bounds* seemed to hold that the prisoner's right of access was adequately safeguarded by the provision of a law library, the issue of whether attorney assistance would be required as an adjunct to the library was not before the court. Therefore, *Bounds* alone cannot resolve the issue of whether the provision of law libraries without attorneys is constitutionally sufficient."); Millemann, *supra* note 159, at 467.

230. *Casey*, 4 F.3d at 1522.

231. ADOC apparently provided attorneys to assist inmates' in accessing the courts. In *Casey*, the prisoners challenged the inadequacy of the attorney's assistance because of the denial of contact visits. *Casey*, 4 F.3d at 1518.

232. 895 F.2d 608 (9th Cir. 1990).

233. *Ching*, 896 F.2d 608; *see also supra* notes 55-60 and accompanying text for a discussion of *Ching*.

234. *Ching*, 895 F.2d at 609.

235. *Casey*, 4 F.3d at 1520.

236. *Id.* at 1523-24.

the Constitution."[237]

2. *From an Attorney's Perspective: A Frustrating Experience*

In the dim visitation room,[238] the attorney is separated from her client by a cinder-block or glass partition.[239] One attorney's summary of her experience best illustrates the frustration:

> [T]he steel mesh barrier between the attorney and her client prevents much of the subtle but important non-verbal or confidential interactions that attorneys normally rely on during depositions. The attorney is unable to see her client's expressions through the grate, and therefore does not know whether his silences are the result of some confusion, lack of memory, or simply because he never heard her questions.[240]

When conversing with her client, the attorney has to shout through a hole or a "telephone attached to the wall farthest away from the partition."[241] No conversations are private.[242] Confidential communication represents the core of an attorney-client relationship, because it encourages "full and frank communications between attorneys and their clients," promotes observance of law, and aids the administration of justice.[243] To a prisoner behind high walls, his at-

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237. *Id.* at 1525 (citing Wolff v. McDonnell, 418 U.S. 538, 555-56 (1974)).

238. One of the regulation-affected units has only one light on the attorney's side of the partition. Casey v. Lewis, 4 F.3d 1516, 1527 (9th Cir. 1993).

239. *Id.* at 1518-19.

240. *Id.* at 1536.

241. *Id.* at 1526.

242. *Id.* Some of the ADOC staff testified that they had overheard the attorney-prison conversation taking place inside the visitation rooms while outside the room. *Casey,* 4 F.3d at 1527. This was true even when the prisoners and attorneys were using moderate voice tones. *Id.*

243. Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343, 348 (1985).

ABA Standards for Criminal Justice mandate that "[a] communication not otherwise subject to reading or hearing should not be intercepted except pursuant to a court order, or unless authorized by law, when the communication is reasonably anticipated to be a prisoner and his or her attorney." ABA STANDARDS FOR CRIMINAL JUSTICE § 23-6.1(d)(i). Although it is unclear whether ABA standards for Criminal Justice govern an attorney's assistance in the context of a civil lawsuit,

torney may be his only "access" to the courts and the society.[244] With a prison authority standing in a close proximity and possibly overhearing the conversations between the attorney and her client, no "full and frank" exchanges between attorneys and clients will occur.[245] This creates "a chilling effect on attorney-client communications"[246] and inevitably impedes effective legal representation.[247]

VI. CONCLUSION

Casey v. Lewis[248] places an unbearable burden on prisoners who challenge a prison regulation violative of their constitutional rights. Consequently, barriers as the one in *Casey* will forever stand. New barriers will be erected. Today, a barrier has separated prisoners from their attorneys. Tomorrow, another barrier will separate them from another constitutional protection. As Judge Pregerson warned, barrier by barrier, our constitutional jurisprudence will be set back another 50 years.[249]

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federal standards promulgated by the Department of Justice, clearly enunciate a prisoner's counsel rights in a civil lawsuit. DEP'T OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAIL § 1.04 (1980). Each facility develops and implements policies and procedures to ensure the right of inmates to have access to legal assistance in civil or criminal matters through counsel and their authorized representatives, or designated counsel substitutes. *Id.* Correctional authorities facilitate access to such assistance, including assisting inmates in making confidential contact with attorneys and their authorized representative. *Id.*

244. *See* Turner, *supra* note 203, at 624-25 ("It is apparent that it is futile for prisoners to proceed pro se.").

245. People v. Barraza, 218 Cal. App. 3d 700, 705 (1990).

246. *Id.*

247. *Casey*, 4 F.3d at 1537 (Pregerson, J., dissenting).

248. 4 F.3d, 1516, 1526 (9th Cir. 1993).

249. *Id.* at 1541.